



SO ORDERED.

SIGNED this 11 day of March, 2005.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

STEPHEN W. GRAY,

DEBTOR.

**CASE NO. 01-14446-DLS
CHAPTER 7**

**MEMORANDUM AND ORDER GRANTING MOTION OF
KANSAS INVESTIGATIVE SERVICES
FOR ADMINISTRATIVE EXPENSE CLAIM**

North American Savings Bank F.S.B/Kansas Investigative Services, Inc. seek a determination that a claim for costs of storage of 1996 Sundowner trailer is entitled to administrative priority pursuant to 11 U.S.C.A. § 503 (b)(1)(A)¹. The Trustee objected. Kansas Investigative Services, Inc. ("KISI") appears by Joseph H. Cassell, of Render Kamas, LLC. The Trustee, J. Michael Morris, appears in person and by Sarah L. Newell of Klenda, Mitchell, Austermann &

¹ Future references in the text to the Bankruptcy Code shall be by section only.

Zuercher, LLC. The Court has jurisdiction.² The Court held an evidentiary hearing, and the parties submitted post hearing briefs. The Court is now ready to rule.

On June 18, 2001, in an action pending in the District Court of Sedgwick County, Kansas, judgment was entered against Stephen W. Gray (hereinafter “Debtor”) in favor of North American Savings Bank, F.S.B. (“North American”) for damages and possession of a 1993 Jayco travel trailer. When the judgment was not satisfied, a Writ of General Execution was filed on July 3, 2001. Emery L. Goad was appointed a special process server. He located and seized Debtor’s 1996 Sundowner trailer, which was thereafter stored by KISI.³ The Jayco trailer was sold. When Debtor filed for relief under Chapter 7, on September 14, 2001, KISI was in possession of the Sundowner trailer.

KISI stored the Sundowner trailer from July 5, 2001, to March 14, 2002, when it was turned over to the Trustee. KISI seeks administrative claim status for the cost of storage of the Sundowner trailer from September 14, 2001 through March 14, 2002, which is 181 days, at the rate of \$7.00 per day, for a total of \$1,267. The Trustee objects.

FINDINGS OF FACT.

The Debtor’s schedules, filed September 27, 2001, included the Debtor’s interest in the Sundowner trailer on Schedule B. Debtor’s Statement of Financial Affairs disclosed that the

² The objection to a claim gives rise to a contested matter. Fed. R. Bankr. P. 3004 and 9014. The Court has jurisdiction over the parties and the subject matter. 28 U.S.C.A. §§ 157(a), 1334(a), and 1334(b). Further this is a core proceeding. 28 U.S.C.A. §157(b)(2)(B).

³ Mr. Emery L. Goad was acting at all times as agent for KISI, and neither the parties nor the Court has made an effort to distinguish between the two.

Sundowner trailer had been repossessed in 2001 by North American and that a judgment had been entered in a collection action brought by North American against the Debtor in Sedgwick County District Court. Nevertheless, the Trustee did not promptly attempt to recover the Sundowner trailer. By letter dated December 12, 2001, counsel for North American advised the Trustee that the Sundowner trailer was being held by Mr. Goad, as appointed process server. By letter dated January 15, 2002, addressed to the Trustee, counsel for North American referred to the December 12th letter and inquired whether the bankruptcy was still active. Although the Trustee testified that in response to the letters he directed a paralegal to ascertain the whereabouts of the trailer, there was no evidence that such action was taken or that Mr. Goad was contacted.

On February 1, 2002, North American filed a motion for award of administrative expenses pursuant to 11 U.S.C. § 503 with respect to the costs of storage of the Jayco (sic) trailer.⁴ On February 12, 2002, the Trustee instituted an adversary proceeding, Case No. 02-5052, in which he sought to avoid an allegedly unperfected security interest in the 1993 Jayco trailer and alleged that the fixing of the liens in both the Jayco trailer and the Sundowner trailer were preferential transfers. Included in the complaint was the allegation that North American had seized both trailers prepetition and that they were being held by KISI, as agent for North American. The complaint stated that “KISI should be ordered to turn over the two(2) trailers to the trustee pursuant to 11 U.S.C. § 551.”⁵ The summons were served upon the defendants, including KISI and North American, by regular, first class,

⁴ Case No. 01-14446, Doc. 13. Although the motion referenced only the Jayco trailer, this appears to have been a technical error. The Court interprets the motion to refer to the Sundowner trailer. The Trustee objected on February 14, 2002. *Id.* Doc. 15.

⁵ Case No. 02-5052, Doc. 1.

United States mail, postage prepaid on February 13, 2002. On March 13, 2002, North American filed an answer in the adversary proceeding, admitting that KISI had seized the two trailers and still possessed the 1996 Sundowner Trailer. On the next day, March 14, 2002, KISI turned over the trailer to the Trustee's agent, with an agreement that the turnover would not impair the lien of KISI, if any.⁶

The Trustee's adversary proceeding and the related matters pending in the main bankruptcy case were procedurally combined. The Final Pretrial Conference Order,⁷ filed December 17, 2003, included the Trustee's claims for avoidance of North American's security interest in the 1993 Jayco trailer and to set aside liens on both the Jayco and Sundowner trailers as preferential. Also joined with the complaint was the claim of KISI for administrative expenses for storing the Sundowner trailer postpetition and the Trustee's objection thereto.

At the commencement of the evidentiary hearing, the parties announced agreements regarding the lien issues,⁸ such that the only issue tried was the claim for administrative expenses. The

⁶ The testimony that the turnover was on March 14, 2002 was uncontroverted. However, it is inconsistent with Exhibit 10 and an attachment to KISI's Post Hearing Memorandum, which evidence that the turnover did not occur until sometime after March 28, 2002. Because the Court, as examined below, holds that KISI in any event is not entitled to administrative claim treatment of storage expenses after March 14, 2002, this apparent inconsistency is not material.

⁷ Case No 02-5052, Doc. 35; Case No. 01-14446, Doc. 69.

⁸ The adversary complaint regarding the security interests in the two trailers was resolved by an agreed order filed on January 26, 2004. That order provided that the Trustee withdrew his lien avoidance claim as to the Jayco trailer, that the transfer of North American's lien on the Sundowner trailer was preferential, and acknowledged that there remained a pending issue of KISI's motion for an administrative claim for cost of storage of the Sundowner trailer. Case No. 02-5052, Doc 38.

parties filed posthearing memoranda addressing the storage cost issue.⁹

DISCUSSION AND CONCLUSIONS OF LAW.

KISI's motion for administrative expense status for the storage costs is predicated upon § 503 (b)(1)(A). It provides:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502 (f) of this title, including –
(1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case:

Because of the statutory reference to the estate, it is generally held that an administrative expense may arise only from a transaction with the trustee or a debtor in possession.¹⁰ This condition requires that the expenses, goods or services be delivered or provided pursuant to a postpetition transaction; it excludes payments which become due after the petition date where the transaction was entered into with the debtor prepetition.¹¹ In addition, the expense must provide benefit to the estate.¹² With respect to the costs of storage of property of the estate, one court has stated:

It is well-established that providing storage for property of the estate constitutes “preserving the estate” within the meaning of section 503(b)(1)(A) and that postpetition storage costs therefore may be granted administrative expense priority. The critical factors are whether

⁹ Case No. 01-14446, Doc. Nos. 71, 72, and 74.

¹⁰ *General American Transportation Corporation v. Martin (In re Mid Region Petroleum, Inc.)*, 1 F.3d 1130, 1133 (10th Cir. 1993).

¹¹ 4 Collier on Bankruptcy ¶ 503.06[3][a](Alan N. Renick & Henry J. Sommer, eds-in-chief 15th ed. rev. 2004).

¹² *Id.* at ¶ 503.06[3][b].

the premises were utilized by the Trustee for storage and whether the estate thereby was benefitted. There is no requirement that there be an express agreement between the Trustee and the owner of the property.... The amount of the costs of administration claim arising from the use of premises to store property of the estate is a benefit accruing to the estate for the use of the premises. In such a circumstance, the measure of the benefit to the estate is a reasonable rental value of the premises which were occupied and used by the Trustee. While the court has discretion to fix the reasonable administrative rent, the contract rate is presumptively the reasonable value for such use and occupancy. Obviously, such a presumption may be rebutted by the Trustee demonstrating that the reasonable worth or value of the lease is different from the contract rate.¹³

The costs of storing vehicles have been allowed as administrative expenses. For example in *Anderson v. Avila*,¹⁴ the Chapter 7 trustee brought an action to recover a vehicle which was allegedly transferred by the debtor post-petition or fraudulently transferred prepetition. The court resolved the claim against the Trustee finding no improper transfer, but ordered that the cost of preserving the vehicle in storage pending the outcome of the proceeding be deemed an administrative expense pursuant to 11 U.S.C. § 503.

The Trustee asserts that KISI does not meet the requirements for an administrative expense claim because there was “no postpetition transaction with the estate,” there was “no substantial contribution to the estate in some demonstrable fashion,” and because KISI was acting to further its own self interest.¹⁵ The first position is predicated upon the absence of an express agreement between

¹³ *In re Aerospace Technologies, Inc.*, 199 B.R. 331, 340– 41 (Bankr. M.D.N.C. 1996) (citations omitted).

¹⁴ *Anderson v. Avila (In re Propps)*, 118 B.R. 376, 379 (Bankr D.S.C. 1989).

¹⁵ Case No. 01-14446, Doc 71, Trustee’s Brief on Administrative Expense Claim Issue, pp. 2-3.

the estate and CISI for the storage of the trailer and the absence of a contract to pay the specific storage charges.¹⁶ The Court rejects this argument. As stated in *In re Aerospace Technologies, Inc.*,¹⁷ there is no requirement that there be an express agreement. Under the circumstances of this case, where the Debtor's schedules listed the trailer, the statement of affairs disclosed that it had been repossessed prepetition, and the Trustee did not attempt to remove the trailer after receipt of correspondence from KISI's counsel, the estate's continued use of storage provided by KISI gave rise to an implied transaction with the estate. The Trustee was aware that KISI was storing the trailer and elected to continue to receive the benefit being provided.

The Court also rejects the Trustee's argument that there was no substantial contribution to the estate arising from the storage of the Sundowner trailer. The trailer was preserved by KISI before the Trustee brought his preference and lien avoidance action and during the pendency of that action, which resulted in the liens in the Sundowner trailer being preserved for the benefit of the estate.¹⁸ It was necessary that the trailer be protected as an asset of the estate before and during the pendency of the Trustee's lien avoidance litigation. The estate benefitted from the storage.

Finally, the Court rejects the Trustee's contention that the storage expenses should not be given administrative expense priority because the storage was undertaken solely to further KISI's self interest. The cases cited by the Trustee are clearly distinguishable. In *In re Bellman Farms, Inc.*¹⁹

¹⁶ *Id.*

¹⁷ *In re Aerospace Technologies, Inc.*, 199 B.R. at 340.

¹⁸ Case No. 02-05052, Docs. 13 and 38.

¹⁹ *In re Bellman Farms, Inc.*, 140 B.R. 986 (Bankr. D.S.D. 1991).

the court denied administrative claim status to expenses incurred by the debtor's ex-wife, who had an interest in the bankruptcy estate. In *Lebron v. Mechem Financial, Inc.*²⁰ the claimant was a former director of the debtor, also not a disinterested party. In *Halyard Realty Trust*²¹ the services were performed for then debtor nearly one year before the filing of the bankruptcy. In this case, the claim is only for services performed postpetition by a disinterested third party who had been appointed to take possession of property by a state court before the filing of the bankruptcy. The fact that storage of the trailer entitles KISI to the payment of a rental fee does not support a finding that the services were undertaken only for KISI's own self interest.

Now that the Court has determined that KISI is entitled to administrative expense claim for storage of the Sundowner trailer, the Court must determine the period during which KISI is entitled to such compensation. KISI requests priority status for storage costs from the date of filing through March 14, 2003, the date when it turned over the trailer to the Trustee. Cases support a ruling that administrative expense treatment for the cost of storage of estate property is appropriate only for a period of time after the filing of the petition²² and before the Trustee had requested turnover of the trailer from KISI. For example, in *In re Vetzel Moving & Storage, Inc.*,²³ the court granted a claim for payment of an administrative expense for the storage of numerous trucks and vehicles owned by the

²⁰*Lebron v. Mechem Financial Inc.*, 27 F.3d 937 (3rd Cir. 1994).

²¹ *Halyard Realty Trust*, 37 B.R. 260 (Bankr. D. Mass. 1983).

²² KISI also stored in the Sundowner trailer prepetition. If it had requested administrative expense priority status for that claim, the Court would have denied the same.

²³ *In re Vetzel*, 84 B.R.786 (Bankr. M.D. Fl. 1988).

debtor from the date the claimant acquired possession to the date the trustee was willing to remove the vehicles. Administrative expense priority was denied for that period of time after the trustee was prevented from taking possession by the claimant because of the unwillingness of the trustee to pay the claimant for storage.²⁴ In *In re Zaisan*²⁵ the debtor's personal property had been picked up and placed in storage by A-1 pursuant to a distress warrant beginning on July 17, 1985. On July 18, 1985, a voluntary chapter 11 petition was filed by the owner, and on August 7, 1985 a written demand for the return of the property was made. On August 13, 1985 the debtor filed its complaint for turnover of property against A-1. The property was finally turned over to the debtor on August 22, 1986. The court held that A-1 was entitled to administrative claim priority with respect to storage costs, but only for the period prior to the debtor's filing of its complaint for turn over the property.

The Court holds that KISI's claim for storage costs is entitled to administrative expense priority from the date of filing of the bankruptcy, September 14, 2001, to March 14, 2002, the day that KISI turned over the trailer to the Trustee. This was one day after KISI answered the Trustee's complaint for lien avoidance and turnover of the trailer. As of this date, KISI was clearly on notice that it was not entitled to retain possession. There was no evidence that KISI was put on notice prior to that date.²⁶ If there had been such evidence, the court would rule that administrative expense priority terminated on such date, as granting administrative expense priority after the person having possession

²⁴ *Id.* at 788.

²⁵ *In re Zaisan*, 80 B.R. 832 (Bankr. S.D. Tex.1987)

²⁶ If there was evidence of the date on which KISI was served with the Trustee's complaint, the Court would be inclined to terminate administrative expense priority on that date. However, the record does not include any substantial evidence of notice to KISI prior to its filing of its answer.

of the property has received a rightful demand for turnover and refuses to comply because of outstanding storage costs would be contrary to public policy. It would reward those having possession of estate property who refuse to turn over the property to the trustee without payment of storage costs.

The final question before the Court is the appropriate rental rate. KISI requests payment at a rate of seven dollars per day. The trailer was stored in a locked lot protected by electric alarms and a barbed wire fence. KISI carried insurance for loss of property owned by third parties. The rate of seven dollars per day was based upon KISI's preferred customer rate of five dollars per day for a car, increased to reflect the fact that the trailer was almost as large as two cars. The testimony also established that the community rate in Wichita for storage of towed cars was a \$15 per day. The Court finds the seven dollar per day rate reasonable.

For the foregoing reasons, the Court grants North American's/KISI's motion and holds that the claim of \$1,267 for storage of the Sundowner trailer from September 14, 2001 through March 14, 2002 is an administrative expense within the meaning of § 503(b)(1)(A).

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